

1 Lowell T. Carruth, # 034065
2 McCormick, Barstow, Sheppard,
Wayte & Carruth LLP
3 P.O. Box 28912
4 5 River Park Place East
Fresno, CA 93720-1501
Telephone: (559) 433-1300
Facsimile: (559) 433-2300
5 Email: lowell.carruth@mccormickbarstow.com

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6 Attorneys for Third-Party Defendant/Cross-claimant
WESTERN INDUSTRIES, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

1 ANDREW SHALABY, an individual, and
SONIA DUNN-RUIZ, an individual,

Case No. 07-CV-2107-W (POR)

Plaintiffs.

WESTERN INDUSTRIES, INC.'S CROSS- CLAIM FOR INDEMNIFICATION

4
5 **V.**
IRWIN INDUSTRIAL TOOL
COMPANY, THE HOME DEPOT, INC.,
and DOES 2 through 100, inclusive,

Judge: The Hon. Thomas J. Whelan

Defendants

WESTERN INDUSTRIES, INC.

Cross-claimant,

V₂

WORTHINGTON CYLINDER
ACQUISITION, LLC, and
WORTHINGTON CYLINDER
CORPORATION.

Cross-Defendants.

25 COMES NOW Cross-claimant WESTERN INDUSTRIES, INC. and alleges as follows:

26 1. On or about September 17, 2004, Cross-claimant WESTERN
27 INDUSTRIES, INC., and Cross-Defendants WORTHINGTON CYLINDER ACQUISITION,
28 LLC, and WORTHINGTON CYLINDER CORPORATION entered into an Asset Purchase

1 Agreement, which was to be effective as of September 1, 2004.

2 2. Under the terms of said Agreement, Cross-claimant sold to Cross-
 3 defendants its propane and specialty gas cylinder business, which included the manufacture and
 4 sale of what is known as MAPP gas cylinders, which further included its contract with Newell
 5 Operating Company to manufacture and sell BERNZOMATIC labeled cylinders containing
 6 MAPP gas.

7 3. Other provisions in the contract involved the assumption of post-closing
 8 liabilities. The contract provided as follows:

9 All liabilities and obligations arising out of the operations of business from
 10 and after the closing date, including without limitation claims of third
 11 parties for damages or injuries suffered as a result of defective products
 12 produced by the business and sold by the purchaser on or after the closing
 13 date. For purposes of this Section 1.09(f), any products with a manufacture
 14 date of thirty (30) days prior to the closing date (the "manufacture cut-off
 15 date") or later, as stamped on the product, shall be deemed to have been
 16 sold by purchaser or one of its affiliates on or after the closing date.
 17 Further, if such manufacture date cannot be ascertained from a stamp on
 18 such product or otherwise and the relevant occurrence occurred on a date
 19 that is ninety (90) calendar days after the closing date, such product shall be
 20 deemed to have been sold by purchaser on or after the closing date.

21 4. In or about June, 2007, Plaintiffs ANDREW SHALABY and SONIA
 22 DUNN-RUIZ filed a First Amended Complaint, a copy of which is attached hereto, marked as
 23 Exhibit "A" and incorporated herein by reference.

24 5. In or about June, 2007, an Answer was filed by BERNZOMATIC and the
 25 HOME DEPOT, INC. to said First Amended Complaint. Attached hereto and marked as Exhibit
 26 "B" is a copy of said Answer.

27 6. In or about June, 2007, a Third-Party Complaint on behalf of
 28 BERNZOMATIC, an unincorporated division of IRWIN INDUSTRIAL TOOL COMPANY, was
 29 filed, naming WESTERN INDUSTRIES, INC., and WORTHINGTON INDUSTRIES as the
 30 third-party defendants. Attached hereto and marked as Exhibit "C" is a copy of said Third-party
 31 Complaint.

32 7. The accident which is referred to in all of said pleadings, occurred on April
 33 21, 2006. Said accident occurred far beyond ninety (90) days from the closing date of the transfer

of the assets and liabilities from Cross-claimant to Cross-defendants. As set forth in the attached pleadings, the date of manufacture of the cylinder in question cannot be ascertained since it has been destroyed.

4 8. If it is determined that Cross-claimant is liable to Third-party Plaintiff
5 BERNZOMATIC on the basis of any contractual indemnity which existed in April 2006, then
6 Cross-claimant is entitled to be fully indemnified by Cross-defendants pursuant to the terms of
7 said written agreement.

8 WHEREFORE, Cross-claimant WESTERN INDUSTRIES, INC., seeks indemnity from
9 Cross-defendants including, but not limited to, any judgment which may be rendered against it
10 and further including, but not limited to, all attorneys' fees and costs which it may incur if it is
11 found responsible in any manner to Third-party Plaintiff BERNZOMATIC; for costs of suit
12 incurred in defending this matter; and for such other and further relief as the Court may deem just
13 and proper.

14 | Dated: December 7, 2007

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

By: /s/ Lowell T. Carruth

Lowell T. Carruth
Attorneys for Third-Party
Defendant/Cross-claimant
TERN INDUSTRIES, INC.

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